United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

76-7576

United States Court of Appeals

SECOND CIRCUIT

B
P/S

BENJAMIN F. RAYSOR, JR.,

Plaintiff-Appellant,

against

WOLF & CO.: Certified Public Accountants, SAMI KATAN: Senior Accountant,

Defendants-Appellees,

and

SHELDON AMES: Manager,

Defendant.

BRIEF FOR DEFENDANTS-APPELLEES

FARRELL, FRITZ, CAEMMERER & CLEARY, P.C.
Attorneys for Defendants-Appellees Wolf and Company, sued herein as "Wolf & Co.: Certified Public Accountants" and Sami Katan, sued herein as "Sami Katan: Senior Accountant".
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TABLE OF CONTENTS

TABLE OF CASES

STATUTE AND RULE CITED

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Preliminary Statement

Plaintiff appeals from a judgment entered in the District Court for the Southern District of New York, Duffy, J., which granted the motion of defendants Wolf & Co. and Sami Katan to dismiss the complaint pursuant to Rules 12(b)(1) and 12(b)(6) F.R.C.P. (1).* Judge Duffy's Endorsement granting the motion, dated November 3, 1976, states that plaintiff's action for relief pursuant to Title VII of the Civil Rights Act, was jurisdictionally defective in that it was not brought within 90 days of plaintiff's July 31, 1975 receipt of a Notice of Right to Sue from the Equal Employment Opportunity Commission, as re-

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* Unless otherwise indicated, numbers in parentheses refer to pages of appellant's appendix.

quired by 42 USC Sec. 2000 e-5 (2). The Endorsement further states that plaintiff did not dispute the running of this period but, instead, offered certain extenuating circumstances in explanation of his delay (2). The District Court found plaintiff's excuses insufficient as a matter of fact and of law and, accordingly, granted defendants' motion on the authority of *DeMatteis* v. *Eastman Kodak Co.*, 511 F.2d 306 (2d Cir. 1975) (2).

Statement of Facts

Plaintiff commenced this action on or about April 23, 1976, by filing his complaint alleging that the defendants have engaged in employment discrimination prohibited by Title VII of the Civil Rights Act of 1964 (13). Paragraph 8 of the complaint states that the Equal Opportunity Employment Commission (EEOC) advised plaintiff, by Notice of Right to Sue received by him on July 31, 1975, that he must commence his action within 90 days of the receipt of said Notice (13c). Plaintiff apparently disregarded this Notice and commenced this action approximately nine months after receipt thereof.

Defendants, Wolf & Co. and Sami Katan, moved the District Court to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim for which relief may be granted (14[a], *et seq.*; 16[a] *et seq.*). Plaintiff's papers in opposition to the motion did not dispute the running of the 90-day statute of limitations but, instead, offered alleged extenuating circumstances in explanation of his delay (17[b] *et seq.*), which the Court found insufficient as a matter of fact and of law to toll the running of the statute of limitations.

Prior to the institution of this action, there were numerous administrative proceedings involving plaintiff's charges which are the basis of this lawsuit (16e, f). At each level, the investigating agency found that there was

no basis for plaintiff's charges (16f). On April 19, 1974, plaintiff filed a verified complaint with the New York State Division of Human Rights charging defendants with unlawful racially discriminatory practices relating to employment (16e, f). By determination dated May 17, 1974, the New York State Division of Human Rights, after a full investigation, dismissed the complaint (11).

On September 24, 1974, an appeal from the above determination was heard by the State Human Rights Appeal Board (12a). By decision dated May 16, 1975, the determination was affirmed (12a).

On or about August 16, 1974, plaintiff filed charges against defendants with the Equal Employment Opportunity Commission (16f). Thereafter, on or about July 31, 1975, EEOC determined that there was no reasonable cause to believe that plaintiff's charges were true and, accordingly, dismissed plaintiff's charges (16f).

Question Presented

Whether failure to file a complaint under 42 U.S.C. § 2000e-5 within 90 days after receipt of a Notice of Right To Sue deprives the District Court of subject matter jurisdiction of the action?

The Court below answered in the affirmative.

ARGUMENT

The District Court properly dismissed the complaint in view of plaintiff's failure to comply with the jurisdictional requirements of 42 USC 2000 e-5 as interpreted by this Court.

In the case at bar there are striking similarities to the facts related in this Court's decision in *DeMatteis* v. *Eastman Kodak Co.*, 511 F.2d 306 (2d Cir. 1975), mod. 520

F.2d 409 (2d Cir., 1975). In *DeMatteis,* as here, EEOC made a finding that there was not reasonable cause to believe that the employee's charge was true. EEOC so informed DeMatteis of its determination; that it had "dismissed" his charge; and that he had a right to commence a civil action, under Title VII, in the United States District Court.

After receiving EEOC's determination and notice of dismissal of his charge against the employer and of his statutory right to file a civil action in the United States District Court, DeMatteis retained counsel. Counsel did not commence an action within 90 days after DeMatteis was given notice by EEOC. Rather, counsel decided that DeMatteis was required to first obtain from EEOC a "Notice of Right to Sue" as mentioned in 29 CFR Sections 1601.25b, and 1601.25c. DeMatteis did not apply for such Notice prior to his receipt of the findings and determination of EEOC.

Thereafter, counsel for DeMatteis obtained a letter from EEOC which stated that DeMatteis would have 90 days from the receipt of *this* Notice to commence a civil action in the United States District Court. DeMatteis commenced an action in the United States District Court *after* the expiration of the 90 days from the receipt of the *first* notice but within 90 days from receipt of the *second* Notice.

The question before this Court in *DeMatteis* was whether the limitation period of 90 days began to run from the receipt of *first* EEOC notice that there was "no reasonable cause to believe that the charge was true" and the dismissal of the charge, or from the *later* receipt of the Notice of Right to Sue obtained by counsel for DeMatteis. This Court held that the 90-day period should be calculated from the receipt of the first notice of EEOC's dismissal of the charge and that the commencement of the action within the applicable 90 days statutory limitation is a jurisdictional fact. *DeMatteis* v. *Eastman Kodak Co.,* 511 F.2d at p. 309.

On February 27, 1975, DeMatteis filed a petition for rehearing based upon allegedly mistaken assumptions by this Court as to the facts of his case. DeMatteis argued that the first notice received by him did not, as described in this Court's opinion, notify him that his charge had been dismissed, and that it did not notify him that he had a right to commence an action but, rather, that he had a right to request in writing from EEOC a Notice of Right to Sue. Accordingly, this Court modified its decision upon rehearing to the effect that its holding that the running of the statutory period commenced from the notice of EEOC's dismissal would have a prospective effect only and will first apply to actions where the claimant had been misled by EEOC and subsequently bring suit on or after May 7, 1975. *DeMatteis* v. *Eastman Kodak Company,* 520 F.2d 409 (2d Cir., 1975).

The case at bar meshes with the facts assumed by this Court in the original *DeMatteis* decision. It is uncontroverted that on or about July 31, 1975, Mr. Raysor received EEOC's determination (3) and the enclosed Notice of Right to Sue (4). *Such is admitted in the complaint* (13-c). An examination of EEOC's determination clearly shows that it "concludes the Commission's processing of the subject charge." Further, the Notice of Right to Sue sent therewith clearly indicates that the charges had been dismissed for "no reasonable cause" and fully and clearly advised Mr. Raysor that he had but 90 days from the receipt of that Notice to commence an action in the United States District Court and, upon failure to do so, his right would be lost. It should be noted that the Notice of Right to Sue also contained the following language:

> "If you do not have a lawyer or are unable to obtain the services of a lawyer, take this notice to the United States District Court which may, in its discretion, appoint a lawyer to represent you. * * *
>
> If you have any questions about your legal rights or

need help in filing your case in Court, call the EEOC representative named above." (4)

Mr. Raysor argues that his case is distinguishable from *DeMatteis* because he is a *pro se* litigant. Such a distinction is not valid, particularly in light of the offers of assistance extended by EEOC in the Notice of Right to Sue and the possible availability of obtaining appointed counsel. Moreover, Mr. Raysor is not the "typical" *pro se* litigant. He is a college graduate, a professional accountant, and now a law school student (12b, Undated affidavit of B. F. Raysor, Jr., seeking extension of time to file Appellant's Brief).

The modification of the first *DeMatteis* decision did not affect this Court's holding that the applicable 90-day statutory limitation is a jurisdictional fact. That holding has been consistently followed. See, e.g., *Whitfield* v. *Certain-Teed Products Corp.*, 389 F.Supp. 274, affd. 533 F2d 353 (8th Cir., 1976); *Tuft* v. *McDonnell Douglas Corp.*, 517 F.2d 1301 (8th Cir., 1975), cert. denied, 523 U.S. 1052, 96 Sup. Ct. 782, 46 LEd2d 641 (1976); *Craig* v. *Eastern Air Lines, Inc.*, 410 F.Supp. 428 (D. Conn., 1975).

Similar thinking has been expressed in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 94 Sup. Ct. 1011, 39 LEd2d 147 (1974); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 93 Sup. Ct. 1817, 36 LEd2d 668 (1973); *Plunkett* v. *Roadway Express, Inc.*, 504 F.2d 417 (10th Cir., 1974); *Franks* v. *Bowman Transportation Co.*, 495 F2d 398 (5th Cir., 1974); *Huston* v. *General Motors Corp.*, 477 F.2d 1003 (8th Cir., 1973); *Wong* v. *Bon Marche*, 508 F.2d 1249 (9th Cir., 1975); *Choate* v. *Caterpillar Tractor Company*, 402 F.2d 357 (7th Cir., 1968); *Genovese* v. *Shell Oil Company*, 488 F.2d 84 (5th Cir., 1973); *McGuire* v. *Trans World Airlines*, 403 F.Supp. 734 (S.D. N.Y., 1975); *Camack* v. *Hardee's Food Systems, Inc.*, 410 F. Supp. 469 (M.D. N.C., 1976); and *McCrary* v. *Metropolitan Life Insurance Company*, 417 F. Supp. 417 (D. Mass., 1976).

In *Goodman* v. *City Products Corp.*, 425 F.2d 702 (6th Cir., 1970), the dismissal of a suit filed one day beyond the statutory period was affirmed. With respect to the limitations period the court said:

> "As regards to judicial extension of the time limitation to further the remedial purpose of the legislation, it is sufficient to state the following language from the United States Supreme Court case of *Kavanaugh* v. *Noble,* 332 US 535, 68 Sup. Ct. 235, 92 L.Ed. 150 (1947) where in dealing with the limitations provision in the tax law the Court has this to say: 'Such periods are established to cut off rights, justiciable or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary. *Roseman* v. *United States,* 323 US 658, 661, 65 Sup. Ct. 536, 89 L.Ed. 2d 535. Remedies for resulting inequities are to be provided by Congress, not by the courts' " 525 F2d at p. 703-704.

See also, *Mungen* v. *Choctaw Inc.,* 402 F.Supp. 1349 (W.D. Tenn., 1975).

Nearly all of the cases above cited involve a fact pattern where there was at least an arguable claim of confusion due to the wording of EEOC's regulations and notices. In the case at bar, there is no such ambiguity. Mr. Raysor received but a single letter from EEOC. That letter contained its determination and its Notice of Right to Sue. Each of these documents is clear and unambiguous. There is, quite simply, no excuse for the plaintiff having failed to comply with the 90-day statute of limitations.

Moreover, the District Court found, as a matter of *fact* and as a matter of law, that the proffered excuses of Mr. Raysor were insufficient (2).

For further discussion of the above issue, the Court is respectfully referred to defendants' memorandum of law which was submitted to the District Court and which is included in the Appendix (14a-g).

CONCLUSION

The judgment of the District Court dismissing the complaint should be affirmed.

It is beyond peradventure that plaintiff Raysor has failed to meet the jurisdictional requirements of 42 USC 2000 e-5 by not commencing this action timely. The excuses he offered, and which were rejected below as both a matter of fact and as a matter of law, can not confer jurisdiction over this dispute. The complaint was properly dismissed. The judgment appealed from should be affirmed in all respects.

Respectfully submitted,

FARRELL, FRITZ, CAEMMERER & CLEARY, P.C.
Attorneys for Defendants-Appellees Wolf and Company, sued herein as "Wolf & Co.: Certified Public Accountants" and Sami Katan, sued herein as "Sami Katan: Senior Accountant".
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376—Affidavit of Service by Mail The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

United States Court of Appeals for the Second Circuit

Benjamin F. Raysor, Jr., Appellant

vs

Wolf & Co., et al., Appellees

State of New York, County of New York, ss.:

Bernard S. Greenberg, being duly sworn deposes and says that he is agent for Farrell, Fritz, Caemmerer & Cleary, P. C. the attorneys for the above named Appellee herein. That he is over 21 years of age, is not a party to the action and resides at 162 East 7th Street, New York, N.Y.

That on the 2nd day of May, 1977 he served the within Brief for Appellee

upon the attorneys for the parties and at the addresses as specified below

Benjamin F. Raysor, Jr.,
Appellant
2200 Madison Avenue,
Apartment 11-C
New York, N.Y. 10037

by depositing two true copies
to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at
90 Church Street, New York, New York
directed to the said attorneys for the parties as listed above at the addresses aforementioned, that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this 2nd day of May, 1977

Roland W. Johnson

Bernard S. Greenberg

ROLAND W. JOHNSON,
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1979